Petition

Supreme Court, U.S.
AUG 24 1981
ALEXANDER L. STEVAS, CLERK

81-400

No.

IN THE

Supreme Court of the United States

October Term 1981

MARGARITA SALAZAR JUANES, and MARCELA SALAZAR JUANES, a minor, EDGAR SALAZAR JUANES, a minor, CARLOS ELADIO SALAZAR JUANES, a minor, and GEMA DEL SOCORRO SALAZAR JUANES, a minor, all minors by and through their Guardian Ad Litem, PATRICK A. ABEYTA,

Petitioners,

vs.

SOUTHWESTERN PUBLIC SERVICES, CO., a New Mexico corporation, CONLEE GRAIN, INC., a Texas corporation, CONLEE SEED INC., a Texas corporation, LOUISIANA SEED COMPANY, Louisiana corporation, HUTCHINSON DIVISION, ROYAL INDUSTRIES, INC., a California corporation, DONALD CONLEE, DOUGLAS CONLEE, J. D. CONLEE, RONALD DOUGLAS, FAUSTINO JUANES, MARIA DE LOS ANGELES JAQUEZ JUANES and NEW YORK UNDERWRITERS INSURANCE COMPANY,

Respondents.

Petition for a Writ of Certiorari to the Supreme Court of the United States.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term - 1981

MARGARITA SALAZAR JUANES, et al.,

Petitioners,

-vs-

SOUTHWESTERN PUBLIC SERVICES CO., etc. et al.,

Respondents.

Petition for a Writ of Certiorari

to the Supreme Court of the United States

QUESTIONS PRESENTED FOR REVIEW.

1. Whether petitioners were denied due process and equal protection of the law where Jury's verdict was not supported by evidence and was contrary to defendants' admissions.

2. Whether petitioners were denied due process and equal protection of the law where the trial Court's Instructions,

and Special Issues presented to the Jury, were incomplete and contrary to law.

3. Whether petitioners were denied due process and equal protection of the law by the trial Court's directed verdict, where genuine conflict of the evidence existed on issues properly for jury.

4. Whether the jury and Appellate Court's consideration of deceased's national origin and alien status, and petitioners' workers compensation benefits, constituted prejudice and bias, and a denial of petitioners' constitutional rights.

5. Whether the trial Court's Order of Dismissal, or Denial of petitioners' Motion for New Trial, constituted an abuse of discretion and prejudicial error, and a denial of petitioners' constitutional rights.

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JUDGMENT AND OPINION BELOW

The Judgment of the trial Court, rendered in the United States District Court for the Northern District of Texas, Lubbock Division, presented here for review, is attached hereto as Appendix "A", and the Special Verdicts of the Jury upon which said Judgment was based is attached hereto as Appendix "B". The Opinion of the United States Court of Appeals, Fifth Circuit, affirming the trial Court's Judgment, is attached hereto as Appendix "C", and was designated as not to be published.

Petitioner's Petition for Rehearing was denied without further Opinion, and said denial is attached hereto as Appendix "D". The Judgment of the United States Court of Appeals for the Fifth Circuit is attached hereto as Appendix "E".

JURISDICTION

The Judgment of the trial Court was filed and entered on March 25, 1980. The Per Curiam Opinion of the United States Court of Appeals for the Fifth Circuit was filed April 21, 1981. A timely Petition for Rehearing was denied by that Court on May 26, 1981, and Judgment accordingly entered on June 1, 1981.

This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1), and the Supreme Court Rules, Section 19(1) (b).

CONSTITUTIONAL PROVISIONS INVOLVED

Fifth Amendment to the United States Constitution:

> "No person shall be . . . deprived of life, liberty or property, without due process of law . . ."

Fourteenth Amendment to the United States Constitution:

> ". . .nor shall any State deprive any

person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

1. Material Facts.

Juan Jaques Juanes was an itinerant farm laboror, born and raised in Mexico. He traveled between that Country and ours to earn his living. He married petitioner Margarita Salazar Juanes in 1969, and she bore him four children, Marcela, Edgar, Carlos and Gema Juanes.

Mr. Juanes first came to the United States in 1970. He worked in Texas for several months of each year thereafter, until 1977. In July of that year, he was employed by Conlee Seed Company and continued in that employment until October 2, 1977. On that afternoon, Mr. Juanes and other employees of Conlee Seed Co.

were required to move a portable grain auger, in its elevated position. The movement was from one grain storage tank to another, and was supervised and directed by Ronald Douglas, Conlee Seed Co.'s Manager. The movement was first in a backward position away from one tank, passing beneath, and clearing a high-tension wire. The auger was then turned and pushed forward across a roadway, and was directed by Ronald Douglas in such a manner as to require its passage beneath the same high-tension wireing at an elevation closer to the ground.

Ronald Douglas was assisting in the movement of the auger, but stepped aside, took five paces from the auger, and continued to direct its movement from that position of safety. Mr. Douglas always knew that the wires were of extreme voltage, and constituted a hazard to the lives of

those moving the auger. Nevertheless, he continued the movement of the auger until the top portion of that equipment came in contact with the high-tension line.

Another workman was slightly burned, but the main thrust of the 12,000 volts of electrical current was grounded through the body of Juan Jaques Juanes, causing mortal shock and burns. He struggled for his life for at least one-half hour before his inevitable demise. Juan Jaques Juanes was just 29 years of age at the time of his death.

The United States Occupational Safety and Health Administration (OSHA) made its investigation of the decedent's death, and found Conlee Seed Company in violation of specific sections of the Occupational Safety and Health Act. Conlee Seed Company was fined, took no

review or appeal of the OSHA holding, and paid the fine levied by that Department, without protest.[1]

2. Parties and Pleadings.

Petitioner, Juan Jaques Juanes' widow, and as Guardian Ad Litem of their minor children, filed this action on July 10, 1978, for the wrongful death of her husband, pursuant to Texas Vernon's Civil Statutes, Article 4671, and for injuries and damages to the decedent from the electrocution resulting in his death, pursuant to Texas Vernon's Civil Statutes Article 5525. The minor children were later represented by Patrick A. Abeyta, appointed by the Court as their Guardian Ad Litem.

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[1] The charge stated: "...the employer failed to instruct employees to lower a metal grain auger which the employees were pushing by hand near energized electrical line in the raised position while the auger was being moved from one location to another."

Petitioners' First Amended Complaint named Faustino Juanes and Maria De Los Angeles Jaques Juanes, the father and mother of the decedent, as necessary parties to their lawsuit.

Petitioners' lawsuit named Ronald Douglas and his employer Conlee Seed Co. as defendants, and sought general, special and punitive damages for their gross negligence, as provided by Texas law.

Douglas Conlee and his brothers, Donald Conlee and J. D. Conlee, as a partnership, owned and controlled the subject premises of the Conlee Seed Co. operation where the death of Juan Jaques Juanes occurred. They let the subject premises by oral agreement to the Conlee Seed Co. Corporation, and they further held a controlling interest, and controlled, that corporation.

Also named as defendants were

Southwestern Public Service Company, who constructed, owned, controlled and maintained the high tension wiring involved in the demise of Juan Jaques Juanes.

Defendant Louisiana Seed Company owned the auger in question. They had modified the auger, creating difficulty in raising and lowering the extended portion thereof.

Defendant Hutchinson Division, Royal Industries, Inc., manufactured the subject auger and sold that equipment to defendant Louisiana Seed Company.

New York Underwriters Insurance Company intervened in the case, to recover workers' compensation benefits paid to petitioners.

3. Proceedings in the Lower Courts.

The case came to trial by jury on March 17, 1980, on the petitioner's First Amended Complaint, the defendants'

Answers and the intervenor's Complaint in Intervention. Trial continued from day to day until March 25, 1980. The trial Court granted defendant Louisiana Seed Company's motion for directed verdict prior to submission of the case to the jury.

It further appears that the trial Court also dismissed the case as to defendants Douglas Conlee, Donald Conlee and J. D. Conlee, at that time. The record, as compiled, does not note the Court's Order in that respect, but the Appellate Court deemed that order made at the time of oral argument before the Fifth Circuit Court of Appeals.

After argument and instructions, the jury returned its Answers to Special Issues and Verdict for all defendants. Judgment for Defendants was entered accordingly. Plaintiffs brought their

Motion for New Trial on April 3, 1980, and the trial Court denied that Motion on April 7, 1980. Plaintiffs filed their Notice of Appeal on May 5, 1980. Intervenor also appealed. The Fifth Circuit Court of Appeal affirmed the Judgment by its Opinion of April 21, 1981, denied the Petition for Rehearing on May 26, 1981, and Judgment was entered on June 1, 1981.

Petitioners now seek Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

1. Petitioners were denied due process and equal protection of the law by jury's verdict not supported by the evidence and contrary to defendants' admissions.

The Special Issues as determined by the jury in the case against Ronald Douglas and Conlee Seed Co. are not only without any support in the evidence, but contradicts the testimony and evidence of those defendants. Conlee Seed Co. did not raise the issue of agency, and conceded that the acts, omissions and conduct of Ronald Douglas were its acts, omissions and conduct.

First, by its finding on Special Issue No. 7, the jury found that Ronald Douglas did not fail to properly control the auger "in such a manner as to prevent its contact with the defendants'

distribution line".[2] That finding has no support in the evidence presented to the trial Court. To the contrary, defendants themselves conceded that Ronald Douglas had full control of the Conlee Seed Co. premises on the day in question. Further, he was in direct control and supervision of the five-man crew, including decedent, that was moving the portable auger at the time of the electocution death of Juan Jaques Juanes. He testified as to his specific directions to the crew at all times during the movement up to and including the time he directed the movement of the auger into contact with the overhead power line.

He knew of the voltage of that line, and its potential hazard to the life of those moving the auger. He

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[2] Full Text set forth in Appendix B-3

stepped back to observe the approach of the top of the auger as it neared the wire, and admitted that he could not see the top of the auger, nor the wire, at the time of contact, because he was looking somewhat into the sun. He further admitted that he knew the crew moving the auger was relying upon him to ascertain the clearance of the auger beneath the wire at the time of the accident.

He admitted to Mr. Phanmiller, petitioners' investigator, that the auger should have been lowered, but that he neglected to do so because of the press of the business on that day. At the trial, he did not deny that statement.

The only reasonable conclusion to be drawn from that evidence, is that Ronald Douglas not only failed to exercise ordinary care, but that he exercised no care at all, and acted with a wanton

disregard for the life and safety of the crew working under his direction.

Next, in response to Special Issue No. 8, the jury found that Conlee Seed Co., acting through Ronald Douglas, or failing to act through him or other supervisory employees or officers, did not fail to effectively guard against contact with high voltage overhead lines in the operation of the auger in question.[3]

The basis or rationale for this finding is not found in the evidence presented at the trial of this cause. The fact that the top portion of the auger struck the overhead lines is conclusive evidence that they did fail to effectively guard against that contact. Further, the auger did not run out of control in some manner, but was under the constant supervision and direction of Ronald Douglas,

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[3] Full Text set forth in Appendix B-4

right up to the time of its contact with the overhead line. Ronald Douglas testified that he hollared "stop" just before the auger hit the wire, but that admonishment came to late to save the life of the decedent in this case.

In response to Special Issues 8(b) and 8(c), the jury found that Conlee Seed Co., acting through its agents, or failing to act through its agents, did not require Juan Jaques Juanes to perform a function or activity upon its premises when it was possible that Juan Jaques Juanes or any part of the auger in question, would be brought within six feet of any high voltage overhead line, and that said defendant did not erect, install, operate or move any of its machinery. . . within six feet of any high voltage overhead line.[4]

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[4] Full Text set forth in Appendix B-6

But the testimony of that defendant's agents, Ronald Douglas and Norman R. Willis, was to the contrary, and specified such movement of equipment not once, but twice, beneath the high voltage overhead line with which contact was made. with less than six feet clearance each time.

On the first movement of the auger backward from the bin it had been servicing, defendant's agent Norman Willis testified that the top portion of the auger passed beneath the wire and missed contact by less than two feet. That movement was near the wire's connection to its utility pole. The auger was then turned and pushed forward in the direction of the same power line, at a distance from its connection with the utility pole, where it would necessarily sag and be closer to the ground. On this

occasion, Ronald Douglas testified that he knew that the auger would pass less than two feet from the wire on that movement.

Mr. Willis testified that on the forward movement, he was holding the back portion of the extended pipe section of the auger above the ground, at his knee level, and that when he heard Ronald Douglas' admonishment to stop, he immediately dropped the end of the auger because "...whoever (is) hit is just going to cook". He also stated that the time between Ronald Douglas' admonishment to stop and the time of the contact with the wire was a "split-second".

Finally, in response to Special Issue No. 8(d), the jury incredibly found that defendants "did not fail to post the warning signs required by Article 1436c (of Texas Vernon's Civil Statutes)".

Both defendant Ronald Douglas and defendant Douglas Conlee testified that no such warning signs were posted, and both conceded that no warning signs of any type were on the premises at the time of the electrocution death of Juan Jaques Juanes. The posting of warning signs was not even an issue of the case, the defendants having conceded the absence of such signs prior to trial, in their answers to interrogatories.

Texas Vernon's Civil Statutes, Article 1436c, prohibits any person or corporation from operating any of its machinery or equipment within six feet of any high voltage overhead line, or requiring any employee to so operate its machinery or equipment, and further prohibits the operation of any crane, derrick or similar apparatus which is capable of any vertical, lateral or

swinging motion within ten feet of any high voltage overhead line, unless warning signs are posted with visibility specified in said sections.[5]

The trial Court summarized that section in its instructions to the jury, but omitted that portion of the statute designating such activity as criminal conduct, and providing for criminal sanctions and fines for the violations of the statute.

2. Petitioners were denied due process and equal protection of the law by the trial Court's Instructions and Special Issues presented to the Jury, were incomplete and contrary.

The Court's Special Issue No. 1, improperly limited defendant Southwestern Public Service Company's liability to a

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[5] Full text set forth in Appendix B-7

negligent failure to equip its overhead high voltage lines with a lower, neutral, grounded wire, or to their failure to raise the lines higher, for safety purposes.[6] That defendant's negligence should more reasonably be predicated upon its failure to take any remedial action to prevent electrical contact of its lines with equipment in a material handling area, such as that of the Conlee Seed Co. premises here involved. The least expensive remedial actions, either the placement of a dummy-line or rope six feet beneath the lowest high voltage line, or the use of an insulated wire, was not contemplated by the instruction given, nor was the jury permitted to consider the Power Company's negligent failure to post warning of the danger generated by their exposed high

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[6] Full Text set forth in Appendix B-2

tension lines involved here.

Texas law affirms the responsibilty of the power company to construct and maintain its power lines with due care to avoid injury to others, and this duty extends to both the power company and the owner of the premises (Edwards v. Shell Oil Company (1981) 611 S.W.2d 904).

Further, the National Electrical Safety Code requires inspection of the lines from time to time, and places upon the power company owning such lines, the duty to repair lines and equipment known to be defective or to disconnect and isolate such facilities. No instructions were given to the jury as to such duty or care, nor the obligations of the power company, to which references have been made, although petitioners produced expert testimony as to the standards of care created by the National Safety Code

as to a power company's duty to inspect its lines, repair hazardous conditions, and maintain its lines "so as to reduce hazards to life as far as practical". (National Electric Safety code, Sections 211, 214 A(2), A(5).

Finally by-passed in the Court's charge to the jury, were requested instructions suggesting applicability of a higher duty of care where work is to be performed near high tension wires. Such a standard of care, where electrical wires are concerned, was imposed by the Court in Texas Power and Light Co. v. Holder, 385 S.W.2d 873; 393 S.W.2d 82. The trial Court's failure to charge the jury concerning such higher standard of care, in disregard of Texas Power and Light Co., v. Holder, supra, was clearly contrary to law, and therefore, standing alone, was reversible error (Ambrose v.

Wheatley (DDEL 1971) 321 F.Supp. 1220; McKinley v. Skibs (H/S Arizona, E.D.Pa. 1968) 286 F.Supp. 691).

3. Petitioners were denied due process and equal protection of the law by the trial Court's directed verdict, because of genuine conflict of evidence on issues properly for jury.

At the conclusion of the trial, and prior to the submission of the case to the jury, defendant Louisiana Seed Co. moved for a directed verdict, and the trial Court granted the motion, directed verdict for such defendant, and entered its Order and Judgment accordingly.

Defendant Louisiana Seed Company was the owner of the auger involved in the wrongful death of Juan Jaques Juanes. They loaned the auger to defendant Conlee Seed Co. and would be in the chain of commerce with respect to such auger,

insofar as liability may attach to defendant Hutchinson Division, Royal Industries, Inc., the manufacturer of that equipment. Further, Louisiana Seed Co. modified the auger in question prior to delivery of that equipment to defendant Conlee Seed Co., shortly before the death of decedent herein.

The modification involved an extension of the pipe portion of the auger, and created a difficulty in raising and lowering that extended portion. This became a factor when the auger was moved in its elevated position from one storage bin to another, as it conceivably would have been lowered but for this difficulty, and the electrocution death of Juan Jaques Juanes avoided.

The equipment was delivered to defendant Conlee Seed Co. without any warning as to the auger's potential

hazardous condition, when defendant Louisiana Seed Company knew, or should have known, of its use in an area containing uninsulated high tension wires. The question of this knowledge was in dispute. The directed verdict in this case did not consider that dispute, nor the foregoing theory of liability, and the case should have properly been submitted to the jury.

> "Motion for directed verdict is in nature of demurrer to evidence and concedes as true adversary's evidence, with all reasonable inferences deducible therefrom.
>
> Parker v. James E. Granger, (1936) 4 C.2d 668; 56 S.Ct. 958; 298 U.S. 644

4. The jury and Appellate Court's consideration of deceased's national origin and alien status, and petitioners'

workers compensation benefits, constituted prejudice and bias and a denial of petitioners' constitutional rights.

It is obvious from the preceding sections of this brief that the jury could not have decided the case on the basis of the evidence. That the jury was susceptible to suggestions of bias and prejudice, can be found from defense counsels' constant inferences.

Mr. Evans, during examination of a witness, raised the inference that decedent was residing in this Country illegally, and even after the trial Judge instructed the jury to disregard references to a high rate of starvation and disease in Mexico, defense counsel persistently made similar references during questioning.

During final argument, defendants belabored plaintiffs' "failure" to engage

a local expert, but instead "went to Canton, Ohio and brought down to Lubbock a man who professes to be an expert". And no less than four times in the same paragraph, one defense attorney stated how things are done "in this Country", further underlining decedent's heritage, and made irrelevant and unsupported references to meager earnings of laborers in "old Mexico".

Petitioners got no better treatment in the Fifth Circuit Court of Appeal. There, that august Court inquired as to the illegal alien status of Juan Jaques Juanes at the time of his demise, and entered into a colloquy with defense counsel on that subject. Further, they inquired into, ascertained, and reported in their Opinion, petitioners' receipt of workers' compensation benefits. None of said considerations were relevant to

to any issue on appeal. Intervenor's claims for reimbursement of such workers' compensation benefits were not subject to review and petitioner did not dispute that claim.

The evidence of bias and prejudice in this case, though circumstantial, reveals the absence of "fundamental fairness" to petitioners, and defines the denial of due process to them.

> "The touchstone of due process is fundamental fairness."
>
> Salas v. Cortez,
>
> 24 Cal.3d 22

5. The trial Court's Order of Dismissal and its denial of petitioners' Motion for New Trial constituted an abuse of discretion and prejudicial error, and a denial of petitioners' constitutional rights.

A. Order of Dismissal error.

The Court, at the conclusion of the case, dismissed the case as to Douglas Conlee, Donald Conlee and J. D. Conlee. While an order of dismissal does not appear in the trial transcripts, the appellate Court deemed that dismissal in light of references made by the trial Court.

The Conlee brothers liability is sought as the owners and operators of the premises and in view of their knowledge of the dangerous and hazardous condition that they created in constructing the storage bins and a material handling area near the high tension wires here involved.

Further, Donald Conlee testified as to his authority over the premises and responsibility for the safety of his employees and others utilizing that locality. He testified to his knowledge

of the operation and the movement of portable augers, in a raised position, from bin to bin, and his failure to post warning signs or take any steps whatsoever to prevent injury or death to persons in the area utilizing equipment and augers beneath the exposed high tension wiring on the premises.

Under Texas law, an owner of premises owes a duty to invitees to warn of and correct dangerous conditions (W. G. Schley v. Structural Metals, Inc., (1979) 595 S.W.2d 572; Sun Oil Co. v. Massey, (1979) 594 S.W.2d 125).

The issue of the breach of such duty was a question for the jury, and the dismissal was improper and a denial of due process to petitioners.

B. Denial of Motion for New Trial abuse of discretion.

"It is a principle well recognized

in the federal courts that the granting or refusing of a new trial is a matter resting within the discretion of the trial court. The term 'discretion', however, when invoked as a guide to judicial action, means a sound discretion, exercised with regard to what is right and in the interests of justice. And an appellate court is not bound to stay its hand and place its stamp of approval on a case when it feels that injustice may result. Quite to the contrary, it is definitely recognized in numerous decisions that an abuse of discretion is an exception to the rule that the granting or refusing of a new trial is not assignable as error."

Commercial Credit Corp. v. Pepper, (CA 5th, 1951) 187 F.2d 71, 75-76

The trial Court clearly abused its discretion in not granting a new trial, and this abuse of discretion is reversible error. Numerous examples of the trial Court's abuse of discretion may be found. Thus, the petitioners have argued in prior sections of this brief, that the verdict was not supported by the evidence, and was against the weight of the evidence. Since the verdict in the present case was without foundation, it was reversible error for the trial Court to refuse to grant a new trial.

In Aetna Casualty v. Yeatts (CCA 4th, 1941) 122 F.2d 350, 352-353, the Court set forth the duty of the trial Judge when confronted with a verdict not supported by evidence and against the weight of the evidence:

"On such a motion it is the duty

of the judge to set aside the verdict and grant a new trial, if he is of opinion that the verdict is against the clear weight of the evidence, or is based upon evidence which is false, or will result in a miscarriage of justice, even though there may be substantial evidence which would prevent the direction of a verdict."

Further, a new trial should have been granted on the obvious basis of the prejudice and bias of the jurors, and it was an abuse of the trial Court's discretion not to do so (See Draper v. Airco (CA 3d. 1978) 580 F.2d 91.

Still another area clearly showing an abuse of discretion in not granting a new trial, is the previously discussed error of the trial Court in charging the jury. The following words from Moores Federal Practice, Vol. 6A, Section 59.08

(2) are relevant;

> Unless it is non-prejudicial, the giving of an erroneous instruction or the failure to give a proper requested instruction is a ground for a new trial, provided the party moving for a new trial made an objection before the jury retired to consider its verdict, and stated distinctly the matter to which he objected and the grounds of his objection. But although no timely or proper objection was made, the Court's error in instructing on a material issue may be a basis for a new trial when it is apparent that a miscarriage of justice may otherwise occur."

As the above cited authorities strongly show, the trial Court's refusal to grant plaintiffs' motion for a new

trial was prejudicial error. The judgment below must be reversed on this ground.

CONCLUSION

The evidence of this case so clearly shows the liability of the defendants' for the death of Juan Jaques Juanes, so as to render the verdict and Judgment in this case incomprehensible.

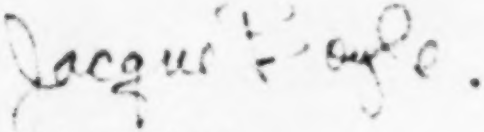
Petitioners never had their day in Court, or a fair trial on the merits. They were denied fundamental fairness at each stage of the proceedings. Such denial was unwarranted, and an exercise of discrimination and bias.

This Court is seldom asked to review a matter solely involving the rights of a litigant. But if Mrs. Juanes and her children do not have the protection of our Constitutional rights, then the lofty language of the Constitution has no

meaning for anyone.

Petitioners respectfully pray that a writ of certiorari issue from and by this Honorable Court, to review the decision and opinion of the Fifth Circuit Court of Appeal, and that such decision and opinion be summarily reversed, with instructions to remand the case for a trial on the merits as to all issues of the case, and for such other and further orders and directions as this Honorable Court deems just in the premises.

Respectfully submitted,



JACQUE BOYLE
Attorney for Petitioners

APPENDIX "A"

Judgment of The United States District Court

In the United States District Court for the Northern District of Texas, Lubbock Division.

Civil Action No: CA-5-78-80

Filed March 25, 1980

MARGARITA SALAZAR JUANES, and MARCELA SALAZAR JUANES, a minor, EDGAR SALAZAR JUANES, a minor, CARLOS ELADIO SALAZAR JUANES, a minor, and GEMA DEL SOCORRO SALAZAR JUANES, a minor,

Plaintiffs,

v.

SOUTHWESTERN PUBLIC SERVICE COMPANY, a New Mexico Corporation, CONLEE GRAIN, INC., a Texas Corporation, CONLEE SEED COMPANY, INC., a Texas Corporation, HUTCHINSON DIVISION, ROYAL INDUSTRIES, INC., a California Corporation, RONALD DOUGLAS, FAUSTINO JUANES, and MARIA DE LOS ANGELES JAQUEZ JUANES,

Defendants.

Judgment

This action came on for trial before the Court and a jury, the undersigned Judge presiding, and the issues having been duly tried and the jury having duly rendered its verdict,

It is Ordered and Adjudged that the plaintiffs, Margarita Salazar Juanes, and Marcela Salazar Juanes, a minor, Edgar Salazar Juanes, a minor, Carlos Eladio Salazar Juanes, a minor, and Gema Del Socorro Salazar Juanes, a minor, take nothing of and from Southwestern Public Service Company, a New Mexico corporation, Conlee Grain, Inc., a Texas corporation, Conlee Seed Company, Inc., a Texas corporation, Louisiana Seed Company, a Louisiana corporation, Hutchinson Division, Royal Industries, Inc., a California corporation, Donald Conlee, Douglas Conlee, J.D. Conlee, Ronald Douglas, Faustino Juanes, and Maria de Los Angeles Jaquez

Juanes, and the intervenor, New York Underwriters Insurance Company, shall have and recover nothing of and from the defendants.

It is further Ordered and Adjudged that the party defendants Faustino Juanes and Maria de Los Angeles Jaques Juanes, shall have and take nothing from the party defendants, Southwestern Public Service Company, a New Mexico corporation, Conlee Grain, Inc., a Texas corporation, Conlee Seed Company, Inc., a Texas corporation, Louisiana Seed Company, a Louisiana corporation, Hutchinson Division, Royal Industries, Inc., a California corporation, Donald Conlee, Douglas Conlee, J.D. Conlee and Ronald Douglas.

It is further Ordered, Adjudged and Decreed that all other relief prayed for by any of the parties hereto by way of recovery against the other parties is denied, and all costs shall be borne by

the plaintiffs.

The Clerk will furnish a copy hereof to each attorney.

ENTERED this 25th day of March, 1980.

s/ Halbert O. Woodward
HALBERT O. WOODWARD
Chief Judge
Northern District of Texas

APPENDIX "B"

Verdict

In the United States District Court
For the Northern District of Texas,
Lubbock Division.
Filed: March 25, 1980
Margarita Salazar Juanes, et al.,
Plaintiffs,
Southwestern Public Service Co., et al.,
Defendants.
Civil Action No. CA-5-78-80

Verdict

We, the jury in the above case, do hereby return in open court our unanimous answers to the attached special issues as our verdict in this case.
March 24, 1980

s/ Edwin L. Rinewalt
Presiding Officer

SPECIAL ISSUE NO. 1

Do you find from a preponderance of the evidence that Southwestern Public Service Company's failure to equip its overhead high voltage electrical lines with a lower, neutral, grounded wire, or its failure to raise the lines higher, for safety purposes was "negligence" as that term is defined herein?

ANSWER: ~~"It was negligence"~~ or "It was not negligence."

ANSWER: "It was not negligence"

If you have answered the foregoing Special Issue No. 1, "It was negligence," then and only in that event, answer the following question. Otherwise skip to Special Issue No. 4.

. . .

SPECIAL ISSUE NO. 4(a)

(a) Do you find from a preponderance of the evidence that at the time the portable grain auger in question was

manufactured by Hutchinson Division of Royal Industries, Inc., the auger was defectively designed?

By the term "defectively designed" as used in this issue is meant a product that is unreasonably dangerous as designed, taking into consideration the utility of the product and the risk involved in its use.

ANSWER: ~~"It was defective"~~

or

"It was not defective".

If you have answered Special Issue No. 4(a) "It was defective", you will answer Special Issue No. 4(b), otherwise, do not answer Special Issue No. 4(b), 5 or 6 and proceed to Special Issue No. 7.

. . .

SPECIAL ISSUE NO. 7

(a) Do you find from a preponderance of the evidence that Ronald Douglas

failed to properly control the auger in such a manner as to prevent its contact with the Defendant's distribution line?

By the term "Proper Control" is meant that kind and degree of control that would be exercised by an ordinary prudent person under the same or similar circumstances.

ANSWER "He failed"

or

"He did not fail".

If you have answered the foregoing Special Issue No. 7(a) "He failed", and in that event only, then answer the following subdivisions of this Special Issue.

. . .

SPECIAL ISSUE NO. 8

Do you find from a preponderance of the evidence that the Conlee Seed Company, Inc. acting through Ronald Douglas; or failing to act through him, or other

supervisory employees or officers . . .

(a) Failed to effectively guard against contact with high voltage overhead lines in the operation of the auger in question?

ANSWER: "It did fail to effectively guard"

or

"It did not fail to effectively guard".

In answering the above subdivision, you are advised that Article 1436c provides in Section 6 as follows:

"When any person, firm, or corporation desires to temporarily carry on any function, activity, work, or operation in closer proximity to any high voltage overhead line than permitted by this Act, the person or persons responsible for the work to be done shall promptly notify the operator of the high voltage line. The work shall be performed only after satis-

factory mutual arrangements have been negotiated between the owner or the operator of the lines or both and the person or persons responsible for the work to be done for temporary mechanical barriers separating and preventing contact between material, equipment, or persons and high voltage electric lines, temporary de-energization and grounding, or temporary relocation or raising of the lines."

(b) Required Juan Juanes to perform a function or activity upon its premises when it was possible that Juan Juanes would move or be placed within six feet of a high voltage overhead line or that any part of the auger in question would be brought within six feet of any high voltage overhead line?

ANSWER: ~~"It did require Juan Juanes to perform such activity."~~

or

"It did not require Juan

Juanes to perform such activity".

(c) Did erect, install, operate, or move any of its machinery, equipment, house or other building or structure to within six feet of any high voltage overhead line?

ANSWER: ~~"It did so erect, install and operate a machinery, building or other structure"~~

or

"It did not so erect, install and operate machinery, building or other structure".

(d) Failed to post the warning signs required by Article 1436c as you are above instructed?

ANSWER: ~~"It did fail to post such warning signs"~~

or

"It did not fail to post such warning signs".

. . .

NOTE: Special Issues No. 2, 3, 4(b), 5(a) 5(b), 5(c), 6 (a) through (d), 7 (a) through (c), 9, 10, 11, 12, 13, 14 and 15, are omitted here, inasmuch as they were rendered moot by the jury's adverse determination of the operative facts of the case. They involved issues of proximate cause, gross negligence, damages and other factors which were never considered by the jury because of their initial findings.

APPENDIX "C"

Opinion of the Court of Appeal

In the United States Court of Appeals For the Fifth Circuit, Unit A. No. 80-1510.

Margarita Juanes, et al., Plaintiffs-Appellants, New York Underwriters' Insurance Company, Intervenor--Appellant, v. Southwestern Public Service Co., etc. et al., Defendants-Appellees.

Appeals from the United States District Court for the Northern District of Texas. (April 21, 1981)

Before Thornberry, Coleman and Ainsworth, Circuit Judges.

Per Curiam:

On October 2, 1977, Juan Jacques Juanes was accidently electrocuted while assisting in moving a grain auger from one location to another, the auger having come in contact with overhead high tension electric wires. The Juanes family received,

and are receiving, Workers' Compensation benefits from the employer's insurance carrier. On various grounds suit was filed against a number of defendants, including a claim of gross negligence against the employer. The case was tried to a jury which returned a verdict in favor of all defendants. This appeal followed. We heard oral argument in New Orleans on April 20, 1981. Upon consideration of the trial record, the briefs of the respective parties, and oral argument, it clearly appears that the issues were for the resolution of the jury. No reversible error was committed in the process of submitting the case to the jury nor in the denial of a motion for a new trial. Accordingly, we must affirm the judgment which the District Court entered in conformity with the verdict of the Jury.

AFFIRMED.

APPENDIX "D"

On Petition for Rehearing

In the United States Court of Appeals for the Fifth Circuit, Unit A

No. 80-1510

Filed May 26, 1981

Margarita Juanes, et al.

Plaintiffs-Appellants,

New York Underwriters' Insurance Company,

Intervenor-Appellant,

Appeals from the United States District Court for the Northern District of Texas.

On Petition for Rehearing

(May 26, 1981)

Before Thornberry, Coleman and Ainsworth, Circuit Judges.

Per Curiam:

It Is Ordered that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied and the mandate will issue

forthwith.

Entered For The Court:

s/ Jas. P. Coleman
United States Circuit Judge

APPENDIX "E"

Judgment

United States Court of Appeals For the Fifth Circuit.

No. 80-1510

D. C. Docket No. CA-5-78-80

Margarita Juanes, et al.,

Plaintiffs-Appellants,

New York Underwirters' Insurance Company,

Intervenor-Appellant,

versus

Southwestern Public Service Co., etc. et al.,

Defendants-Appellees

Appeal from the United States District Court for the Northern District of Texas.

Before Thornberry, Coleman and Ainsworth, Circuit Judges.

Judgment

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern

District of Texas, and was argued by counsel;

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered that plaintiffs-appellants and intervenor-appellant pay to defendants-appellees the costs on appeal, to be taxed by the Clerk of this Court.

April 21, 1981

Issued as Mandate May 26, 1981

FILED: JUNE 1, 1981

- PROOF OF SERVICE BY MAIL -

I, BRUCE E. CLARK, declare and state:

That I am a member of the Bar of the Supreme Court of the United States. That I am not a party to the within action and my business address is 707 Wilshire Boulevard, Suite 4670, Los Angeles, California 90017. On August 24, 1981, I served the within Petition for a Writ of Certiorari to the Supreme Court of the United States on all parties involved in said action, by placing three copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

UNITED STATES COURT OF APPEALS
Fifth Circuit
Office of the Clerk
600 Camp Street
New Orleans, Louisiana 70130

HONORABLE HALBERT O. WOODWARD, JUDGE
UNITED STATES DISTRICT COURT
Northern District of Texas
1205 Texas Avenue
Room C-221
Lubbock, Texas 79401

MR. BRUCE MAGNESS
HURLEY & SOWDER
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Lubbock, Texas 79408

PATRICK A. ABEYTA
Attorney At Law
Post Office Box 10324
Lubbock, Texas 79408

I declare under penalty of perjury, that the foregoing is true and correct.

Executed August 24, 1981, at Los Angeles, California.

Bruce F. Clark

BRUCE F. CLARK, Declarant
Member of the Bar of the
United States Supreme Court

Opposition

1

Office-Supreme Court, U.S.
FILED
SEP 23 1981
ALEXANDER L. STEVAS,
CLERK

No. 81-400

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

MARGARITA SALAZAR JUANES, and MARCELA SALAZAR JUANES, a minor, EDGAR SALAZAR JUANES, a minor, CARLOS ELADIO SALAZAR JUANES, a minor, and GEMA DEL SOCORRO SALAZAR JUANES, a minor, all minors by and through their Guardian Ad Litem, PATRICK A. ABEYTA, *Petitioners*

vs.

SOUTHWESTERN PUBLIC SERVICE COMPANY, a New Mexico Corporation, CONLEE GRAIN, INC., a Texas corporation, CONLEE SEED, INC., a Texas corporation, LOUISIANA SEED COMPANY, a Louisiana corporation, HUTCHINSON DIVISION, ROYAL INDUSTRIES, INC., a California corporation, DONALD CONLEE, DOUGLAS CONLEE, J. D. CONLEE, RONALD DOUGLAS, FAUSTINO JUANES, MARIA DE LOS ANGELES JAQUEZ JUANES and NEW YORK UNDERWRITERS INSURANCE COMPANY, *Respondents*

Brief In Opposition To Petition For Certiorari To The United States Court of Appeals For The Fifth Circuit

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term — 1981

MARGARITA SALAZAR JUANES, et al.,
Petitioners

vs

SOUTHWESTERN PUBLIC SERVICES CO., etc. et al.,
Respondents

Brief in Opposition to Petition for Certiorari

SUMMARY OF ARGUMENT

The decisions below, as to the claim against this Defendant, were in accordance with long established law that Plaintiff must produce some evidence to support his claims as to liability before he will be entitled to a submission of issues to the jury, even in a product liability case. There is no question of law at issue justifying issue of a Writ of Certiorari in this case.

ARGUMENT

The claimed product defect in the grain auger borrowed from respondent was that respondent had made changes in its auger to make the tube larger, so that the

angle of transport of grain was lowered, and had changed the winch that raised and lowered the auger.

But all witnesses on the question testified that the changes made did not make the auger extend any higher and did nothing to make the auger more likely to be high enough to strike a high power line. Petitioners' own expert witness testified, after being told the facts of the changes as shown in the undisputed evidence, that such alterations made the auger no more dangerous than it was when it came from the factory that manufactured it, and the change in the gear ratio of the winch made it a little slower to raise and lower, but not as hard to raise and lower as it was when it was purchased.

The law of products liability involved in this case is that of Texas. Texas follows the *Restatement of Torts Second, 405. Sturtevant v. Pagel*, 134 Tex. 46, 130 SW2d 1017 (1939), *Turner v. General Motors Corporation*, 584 SW2d 844 (Tex.Sup. Ct. 1979).

Under this rule the Petitioners had the burden to show: (1) the chattel was unreasonably dangerous; (2) Respondent knew or had reason to know that the auger was or was likely to be dangerous for the use for which it was lent.

It was not disputed that Respondent was the gratuitous lender of the auger. The employer of the deceased workman arranged to borrow the auger in a telephone conversation, sent an employee who picked up the auger and transported it in a totally lowered position. The person who agreed to the lending had never seen the premises of the borrowing company and had no information as to whether there were any electric high lines on bor-

rower's property, but knew that Conlee Seed Company owned and operated several augers of its own.

There was no evidence whatsoever that Respondent knew the auger was or was likely to be dangerous in any respect. There was evidence from the employee of the deceased workman's employer, the one who was directing the movement of the auger in its totally raised position at the time of the contact with the overhead wire, that this auger was no more difficult to raise and lower than the ones on the premises. The expert witness called by Petitioner testified:

> "If they got it properly balanced out, then it would be no worse than the factory 53 foot auger. The six-to-one winch would have made it a little slower, but *not as hard to crank it up and down.*" (italics added)

The evidence showed without any contradiction that "they got it properly balanced out." The loan of the auger was to a company which owned and use many augers, so that there was no duty on the part of the lender to point out to borrower that if an auger was raised under an electric line, or pushed under an electric line lower than such height, there would be contact and danger of injury.

Interesting is Petitioner's claim at pages 24 and 25 of the Petition that the difficulty in raising and lowering the auger "conceivably" could have been a factor, when the auger was being deliberately moved beneath the energized line in a raised position. One fault with this claim is that there was no evidence that any auger was difficult to *lower*; this was easy!

But, as pointed out above, there was no evidence that this particular auger was difficult to raise at any time.

On page 25, Petitioner claims there was in dispute a question of whether Louisiana Seed Company knew or should have known that the auger would be used in an area containing "uninsulated high tension wires." We are astonished that Petitioner would make such claim, when the truth is that not one word of evidence raised such an issue, and it was undisputed in the record that the person at Louisiana Seed Company who made the loan of the auger had no knowledge whatsoever of the premises of the borrower, and the evidence further proved that on the premises of Louisiana Seed Company there were no overhead uninsulated energized lines.

More important, as shown above, there was abundant evidence that those who were in charge of and directing the work of the deceased and his fellow workmen were fully aware of the danger involved in deliberately pushing an auger into an energized line, and in fact, the foreman was looking carefully at the high line hoping to miss it when contact was made. There was no evidence to the contrary.

This Respondent has no quarrel with the law announced by the California court in the case cited by Petitioner, *Parker v. James E. Granger*, 4 C.2d 668 (1936), 56 Sup.Ct. 958, 298 US 644. This court dismissed the appeal for lack of jurisdiction.

Taking as true all the evidence of Petitioner in our case, no issue of fact was raised. The trial court and the United States Court of Appeals, Fifth Circuit, agreed on this. The evidence in the record permits no other conclusion.

The case of *Simien v. S.S. Kresge Company v. Smith Bros. Mfg. Co.*, 566 F.2d 551, 5th Cir. (1978) points out that in a products case a seller is not an insurer and proof of injury alone is not sufficient to create strict liability, but such liability depends on *substantial evidence* (italics ours) that the product was unreasonably dangerous for its intended use, citing *Boeing Company v. Shipman*, 411 F.2d 365,374-75, 5th Cir. (1969) and *Restatement Torts Second, par. 402A* (1965).

Also the *Simien* case cited *Henderson v. Ford Motor Co.*, 519 SW2d 87, 93 (Tex. 1974) in which the Supreme Court of Texas had the following to say:

> "One witness says that the design could be better . . . Liability is not predicated upon such bare criticism. The same statements could be made about reasonably safe products . . ."

In our case the expert witness at first said the auger might be awkward to use if it had not been properly balanced but withdrew that "bare criticism" when he learned that all the proof of record was that it was properly balanced.

Petitioners knew no evidence of an unreasonably dangerous product was produced. In the brief in the 5th Circuit Petitioners could not describe any defect in the auger on which they offered evidence. In this court the suggestion is made that it is "conceivable" that the auger would have been lowered had there not been this (totally unproved) "difficulty" in raising and lowering.

Petitioner's claim that there was a genuine conflict of evidence on issues properly for the jury is not supported by any evidence in the case, and that explains why Peti-

tioner is unable to clearly state even one such issue. The only claim of any such defect is that Respondent modified the auger "and created a difficulty in raising and *lowering* it. There was no evidence of this. The man alleged to have said this, according to Petitioner's brief in the Court of Appeals was Ron Douglas. Ron Douglas testified he did not ever personally raise or lower this auger, but did testify it was no more difficult to raise and lower than the other augers being used there. Then Plaintiff's professional expert testified directly contrary to Petitioner's contention here made.

Petitioners wholly failed to produce any evidence meeting the second requirement of proof to establish liability of a lender of a chattel under Texas law and Restatement Torts, Second, Par. 405, that the lender must know or have reason to know that it is, or is likely to be, dangerous for the use for which it is lent. *Russell Const. Co. v. Ponder*, 143 Tex. 412, 186 SW2d 233 (1945); *Sturtevant v. Pagel*, 134 Tex. 46, 130 SW2nd 1017 (1939).

CONCLUSION

As far as this Respondent is concerned, Petitioners had their day in Court. They were given full opportunity to offer credible evidence that the auger owned and lent by Respondent was unreasonably dangerous for its intended use, and that Respondent knew this or had reason to know it at the time of lending. They wholly failed to produce such evidence.

Respectfully submitted,

CRENSHAW, DUPREE
& MILAM
P.O. Box 1499
Lubbock, Texas 79408
(806/762-5281)

By _____
James H. Milam
Texas Bar No. 14034000
Attorneys for Respondent,
Louisiana Seed Company

September ____, 1981.

CERTIFICATE OF SERVICE

This is to certify that I have mailed a copy of the above Brief in Opposition to Petition for Certiorari on this the _____ day of September, 1981 to the following:

UNITED STATES COURT OF APPEALS
Fifth Circuit
Office of the Clerk
600 Camp Street
New Orleans, Louisiana 70130

HONORABLE HALBERT O. WOODWARD,
JUDGE
UNITED STATES DISTRICT COURT
Northern District of Texas
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Lubbock, Texas 79401

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Opposition

2

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FILED
SEP 24 1981
ALEXANDER L. STEVAS
CLERK

No. 81-400

In The

Supreme Court of the United States

OCTOBER TERM, 1981

MARGARITA SALAZAR JUANES, ET AL.,
Petitioners,

vs.

SOUTHWESTERN PUBLIC SERVICE COMPANY, ET AL.,
Respondent.

On Petition For Writ of Certiorari
To The United States Court of Appeals
For the Fifth Circuit

BRIEF FOR RESPONDENT SOUTHWESTERN PUBLIC SERVICE COMPANY IN OPPOSITION

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No. 81-400

In The

Supreme Court of the United States

OCTOBER TERM, 1981

MARGARITA SALAZAR JUANES, ET AL.,
Petitioners,

vs.

SOUTHWESTERN PUBLIC SERVICE COMPANY, ET AL.,
Respondent.

On Petition For Writ of Certiorari
To The United States Court of Appeals
For the Fifth Circuit

BRIEF FOR RESPONDENT SOUTHWESTERN PUBLIC SERVICE COMPANY IN OPPOSITION

OPINIONS BELOW

The per curiam opinion of the Court of Appeals (Pet. App. C-1 and 2) is not reported. The opinion of the Court of Appeals on the Petition for Rehearing (Pet. App. D-1 and 2) is not reported. The opinion of the District Court (Pet. App. A-1-4) is not reported.

JURISDICTION

The judgment of the Court of Appeals was entered on April 21, 1981. A Petition for Rehearing, timely filed, was denied on May 26, 1981. (Pet. App. D-1 and 2). The Petition for a Writ of Certiorari was filed on August 24, 1981. The jurisdiction of this court is invoked under 28 U.S.C. Sec. 1254(1) and Supreme Court Rule 19(1)(b).

QUESTION INVOLVED

Whether this court should set aside a jury's verdict which has been upheld by two lower courts.

STATUTES AND REGULATIONS INVOLVED

1. The pertinent portion of Art. 1436a, Tex. Rev. Civ. Stat. provides:

> "Except as modifed or changed by ordinance or regulation in incorporated cities and towns, all lines for the transmission and distribution of electric energy, whether along highways or elsewhere, shall be constructed, operated and maintained, as to clearances, in accordance with the National Electrical Safety Code, as published in March, 1948, by the National Bureau of Standards, Handbook 30, as revised by Handbook 81, published by the National Bureau of Standards in November, 1961 * * *."

2. The National Electrical Safety Code published in March, 1948, by the National Bureau of Standards, Handbook 30, Sec. 232-A, which is reproduced as Appendix A-1.

STATEMENT

In 1972, pursuant to a written contract for service, Southwestern Public Service Company constructed on standard utility poles an overhead, 12,000 volt line to

furnish power for motors at a grain elevator located out in the country on a farm. The line was 27'7" above the ground. It was 7'7" higher than it was required to be by the National Electrical Safety Code. The terrain, like most of the Texas Panhandle, was level, and there were no trees and no obstructions. The line was open, obvious, and plainly visible.

Without notice to or knowledge of Southwestern Public Service Company, on October 2, 1977, a crew of workmen of which the deceased was one, while in the process of moving a grain auger under the line, contacted the line, causing the accident.

All workmen, including the deceased, were aware of the line and the risks involved in contacting the line. The entire crew, including the deceased, had been repeatedly warned of the danger as they engaged in the activity of moving the auger, including a warning less than five minutes before the accident happened.

ARGUMENT

The decision of the Court of Appeals is correct. The decision does not conflict with any decision of this court or any other Court of Appeals. It did not depart from the accepted and usual course of judicial proceedings. It was not decided on any important question of federal law which has not been settled by this court. Accordingly, there is no reason for review by this court.

Petitioners, we think, have a misconception of the Constitution of the United States. It does not create property interests. *Thomas v. Bd. of Trustees, etc.*, 515 F.Supp. 280 (USDC, Tex.), at 285.

Petitioners are asking this court to disregard a jury's findings which have been accepted by two courts. The two points which Petitioners advance here were considered by the Court of Appeals and specifically overruled in language as follows:

> "Upon consideration of the trial record, the briefs of the respective parties, and oral argument, it clearly appears that the issues were for the resolution of the jury. No reversible error was committed in the process of submitting the case to the jury nor in the denial of a motion for a new trial." (Pet. App. C-2)

Petitioners tried their case to a jury in the forum they selected from March 17, 1980, until March 25, 1980. Honorable Halbert O. Woodward, Chief Judge for the Northern District of Texas, who has been on the bench since 1968, presided over the trial in a most patient manner, as is evident from the time consumed. Petitioners were afforded every opportunity to make out a case. The court should have directed a verdict for the Defendants. *The Boeing Co. v. Shipman*, 411 F.2d 365 (5th Cir.). The charge gave Petitioners more rather than less than they were entitled to under the evidence. In any event, the jury was not misled. *Coughlin v. Capitol Cement Co.*, 571 F.2d 290 (5th Cir.), at 300; *International Air Industries, Inc. v. American Excelsior Co.*, 517 F.2d 714 (5th Cir.), at 728 (cert. denied, 424 U.S. 943, 96 S.Ct. 1411, 47 L.Ed.2d 349).

Petitioners have not established and cannot establish that there is an absolute absence of evidence to support the jury's verdict. *Bailey v. Southern Pacific Transportation Co.*, 613 F.2d 1385 (5th Cir.), at 1390.

This court was not given jurisdiction merely for the

purpose of affording the losing party another hearing. *Magnum Import Co. v. De Spoturno Coty*, 262 U.S. 159, 67 L.Ed. 922, at 924, from which we quote:

> "The jurisdiction to bring up cases by certiorari from the circuit courts of appeals was given for two purposes: first, to secure uniformity of decision between those courts in the nine circuits: and, second, to bring up cases involving questions of importance which it is in the public interest to have decided by this court of last resort. The jurisdiction was not conferred upon this court merely to give the defeated party in the circuit court of appeals another hearing."

The granting of this petition would be contrary to the Seventh Amendment of the Constitution of the United States and in violation of the "two-court" rule. *Berenyi v. Immigration Service*, 385 U.S. 630, 87 S. Ct. 666, 17 L.Ed.2d 656, at 661.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

Joe Harlan
Mac W. Hancock III
Gibson, Ochsner & Adkins
500 First National Bank Bldg.
Amarillo, Texas 79101
(806) 372-4271

By Mac W. Hancock
One of Counsel

Attorneys For Respondent Southwestern Public Service Company

September 23, 1981.

CERTIFICATE OF SERVICE

I, MAC W. HANCOCK, III, declare and state:

That I am a member of the Bar of the Supreme Court of the United States. That I am not a party to the within action and my business address in 500 First National Bank Building, Amarillo, Texas, 79101. On September 23, 1981, I served the within Brief for Respondent Southwestern Public Service Company In Opposition on all parties involved in said action by placing three copies thereof, with postage thereon fully prepaid, in the United States Mail at Amarillo, Texas, addressed as follows:

United States Court of Appeals
Fifth Circuit
Office of the Clerk
600 Camp Street
New Orleans, Louisiana 70130

Hon. Halbert O. Woodward
Chief Justice
Northern District of Texas
1205 Texas Avenue
Lubbock, Texas 79401

Mr. J. Orville Smith
Crenshaw, Dupree & Milam
P.O. Box 1499
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I declare under penalty of perjury, that the foregoing is true and correct.

Executed September 23, 1981, at Amarillo, Texas.

Mac W. Hancock III

232. A. Basic Clearances - Continued.

TABLE 1.—*Minimum vertical clearance of wires above ground or rails*

[All voltages are between wires unless otherwise stated. Supply wires include trolley feeders]

Nature of ground or rails underneath wires	Guys; messengers; communication, span, and lightning protection wires; effectively grounded continuous-metal-sheath cables of all voltages	Open supply line wires, arc wires and service drops			Trolley contact conductors and associated span or messenger wires [1]	
		0 to 750 volts	750 to 15,000 volts[14]	15,000 to 50,000 volts	0 to 750 volts to ground	Exceeding 750 volts to ground
WHERE WIRES CROSS OVER						
Track rails of railroads (except electrified railroads using overhead trolley conductors) handling freights cars on top of which men are permitted[3 15]	*Feet* [3 15] 27	*Feet* [3] 27	*Feet* [3] 28	*Feet* 30	*Feet* [4] 22	*Feet* [4] 22
Track rails of railroads (except electrified railroads using overhead trolley conductors) not included above [3]	18	18	20	22	[4] 18	[4] 20
Public streets, alleys or roads in urban or rural districts	[6 13] 18	18	20	22	[4] 18	[4] 20
Driveways to residence garages	10	10	20	22	[4] 18	[4] 20
Spaces or ways accessible to pedestrians only	[7] 15	[8] 15	15	17	[9] 16	[9] 18
WHERE WIRES RUN ALONG, AND WITHIN THE LIMITS OF PUBLIC HIGHWAYS OR OTHER PUBLIC RIGHTS-OF-WAY FOR TRAFFIC						
Streets or alleys in urban districts	[10 11 13] 18	[10] 18	20	22	[4] 18	[4] 20
Roads in rural districts	[10 11 13] 14	[10] 15	18	20	[4] 18	[4] 20

Footnotes on following page.

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